

G Balan a/l Govindasamy (practising under the name Tetuan Balan Govind & Assoc) v Lee Moi Moi & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-01(NCVC)(W)-146-04 OF 2016 AND B-01(NCVC)(W)-171-05 OF 2016
VERNON ONG, ABDUL RAHMAN SEBLI AND ASMABI MOHAMAD JJCA
29 MARCH 2017

Agency — Authority of agent — Warrant of authority — Plaintiffs purchased land from purported owner — Purported owner not true owner of land — Plaintiffs failed to acquire title of land — Plaintiffs sued first defendant as solicitor for purported owner for breach of warranty of authority to act — Whether there was breach of warranty to act

Land Law — Sale of land — Duty of solicitor — First defendant released balance of purchase price to purported owner of land — Plaintiff sued first defendant for breach of stakeholder's duties — Whether there was a breach of stakeholder's duty

Tort — Negligence — Breach of statutory duty — Third defendant issued two issue documents of title for same land — Plaintiffs sued third to sixth defendants for negligent and breach of statutory duties

The plaintiffs vide a sale and purchase agreement ('the SPA') purchased a piece of land from the purported owner but it was found later that the purported owner was not the true owner of the land. Consequently, the plaintiffs failed to acquire title to the land. The plaintiffs then filed an action against G Balan a/l Govindasamy ('the first defendant'), the solicitors who were acting for the purported owner for damages for breach of warranty of authority to act and for breach of stakeholders' duties. The plaintiffs also sued their own solicitors, Choung Youn Sin ('the second defendant') for negligence and the registrar of titles and the Selangor State Government ('the third and fourth defendants') and its officers ('the fifth and sixth defendants') for negligence and breach of statutory duties. At the end of the trial, the learned trial judge allowed the plaintiffs' claims. The learned judge held that the first defendant was liable because he had given an implied undertaking that he had the authority to act for Soh Chuan Seng as the true owner of the land. The learned judge further held that the third to sixth defendants were negligent in issuing two original

A issue document of title and in not maintaining proper records on registration of transfer of land. Aggrieved by the decision, the first defendant and the third to sixth defendants filed the present appeals. In relation with the appeal by the first defendant, the issues for determination were: (a) whether the circumstances were such that the warranty of authority given by the first defendant was more extensive in effect so as to warrant that he was acting for the true owner of the land; and (b) whether there was a breach of stakeholder's duty. As for the appeal by the third to sixth defendants, it was submitted that the third defendant took all necessary steps to verify the ownership of the land and acted in good faith, as such, the third defendant was not liable.

C **Held**, allowing the first defendant's appeal in part with no order as to costs and dismissing the third to sixth defendants' appeal with costs:

- D (1) Based on the record of appeal, there was no evidence to justify a finding that a warranty of authority was given on the basis that the first defendant identified the fraudster as the true owner of the land. In other words, there was no evidence to justify an extension of the scope of the implied warranty of authority made by the first defendant. Accordingly, there was a misdirection in law and in fact in the court below on this issue (see para 56).
- E (2) The first defendant's argument that breach of stakeholder's duties was not pleaded was without merit as the particulars of the breach were contained in para 50 of the amended statement of claim. The learned judge had carefully considered the material evidence and in particular to the fact that the first defendant released the balance purchase price in breach of cl 5(b) of the SPA. The court was not persuaded that there was any misdirection on the evidence of the learned judge. The finding of fact of the learned judge that the first defendant was in breach of his stakeholder's duties was affirmed (see para 58).
- F (3) With regards to the third to sixth defendants' appeal, based on the appeal records, the court was not persuaded that there was any misapprehension of the facts or any misdirection on the evidence and the court agreed with the findings of fact by the learned judge. The learned judge had also applied the correct principles of law as enunciated by the Court of Appeal in *Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v Poh Yang Hong* [2015] 5 MLJ 830; which Court of Appeal decision was recently affirmed by the Federal Court in *Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v Poh Yang Hong* [2016] 6 MLJ 413 (see para 59).
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[Bahasa Malaysia summary]

Plaintif-plaintif melalui perjanjian jual beli ('PJB') membeli sebidang tanah daripada pemilik yang dikatakan tetapi ia didapati kemudiannya bahawa

pemilik yang dikatakan itu bukan pemilik sebenar tanah tersebut. Akibatnya plaintif-plaintif gagal untuk mengambil alih hakmilik kepada tanah tersebut. Plaintif-plaintif kemudiannya memfailkan tindakan terhadap G Balan a/l Govindasamy ('defendan pertama'), peguamcara yang bertindak bagi pemilik yang dikatakan tuntutan ganti rugi bagi pelanggaran jaminan kuasa untuk bertindak dan untuk pelanggaran tugas-tugas pemegang saham. Plaintif-plaintif juga menyaman peguamcara mereka, Choung Youn Sin ('defendan kedua') bagi kecuai dan pendaftar hakmilik dan Kerajaan Negeri Selangor ('defendan ketiga dan keempat') dan pegawai-pegawainya ('defendan-defendan kelima dan keenam') bagi kecuai dan pelanggaran tugas-tugas statutori. Di akhir perbicaraan, hakim perbicaraan yang bijaksana membenarkan tuntutan plaintif-plaintif. Hakim yang bijaksana memutuskan bahawa defendan pertama adalah bertanggungjawab kerana dia telah memberi perjanjian tersirat bahawa dia mempunyai kuasa untuk bertindak bagi Soh Chuan Seng sebagai pemilik sebenar tanah tersebut. Hakim yang bijaksana selanjutnya memutuskan bahawa defendan ketiga hingga keenam adalah cuai dalam mengeluarkan dua dokumen isu asal hakmilik dan kerana tidak menjaga rekod-rekod betul mengenai pendaftaran pemindahan tanah. Tidak puas hati dengan keputusan tersebut, defendan pertama dan defendan ketiga hingga keenam memfailkan rayuan-rayuan ini. Berkaitan dengan rayuan oleh defendan pertama, isu-isu untuk penentuan adalah: (a) sama ada keadaan adalah bahawa jaminan kuasa yang diberikan oleh defendan pertama adalah lebih luas sebenarnya adalah untuk menjamin yang dia bertindak bagi pemilik sebenar tanah tersebut; dan (b) sama ada terdapat kemungkiran tugas pemegang saham. Berkaitan rayuan oleh defendan ketiga hingga keenam, ia diujahkan bahawa defendan ketiga mengambil kesemua langkah yang perlu untuk mengesahkan pemilikan tanah tersebut dan bertindak dengan suci hati, oleh itu, defendan ketiga tidak bertanggungjawab.

Diputuskan, membenarkan sebahagian rayuan defendan pertama tanpa perintah terhadap kos dan menolak rayuan defendan ketiga hingga keenam dengan kos:

- (1) Berdasarkan ke atas rekod rayuan, tidak terdapat keterangan untuk menjustifikasikan dapatan bahawa jaminan kuasa diberikan atas asas bahawa defendan pertama mengenal pasti penipu sebagai pemilik sebenar tanah tersebut. Dalam perkataan lain, tidak terdapat keterangan untuk menjustifikasikan lanjutan skop jaminan kuasa yang tersirat yang dibuat oleh defendan pertama. Oleh itu, terdapat salah arahan dari segi undang-undang dan fakta di mahkamah bawahan atas isu ini (lihat perenggan 56).
- (2) Hujahan defendan pertama bahawa pelanggaran tugas-tugas pemegang saham tidak dipidna adalah tanpa merit memandangkan butir-butir terdapat di dalam perenggan 50 pernyataan tuntutan yang dipinda. Hakim yang bijaksana telah mempertimbangkan dengan teliti

- A** keterangan material dan terutamanya kepada fakta bahawa defendan pertama melepaskan baki harga belian dalam melanggar klausa 5(b) PJB tersebut. Mahkamah tidak yakin bahawa terdapat apa-apa salah arah ke atas keterangan hakim yang bijaksana. Dapatan fakta hakim yang bijaksana bahawa defendan pertama melanggar tugas-tugas pemegang sahamnya adalah disahkan (lihat perenggan 58).
- B**

- (3) Berkaitan rayuan defendan ketiga hingga keenam, berdasarkan rekod rayuan, mahkamah tidak yakin bahawa terdapat apa-apa salah tafsir fakta atau salah arah ke atas keterangan dan mahkamah bersetuju dengan dapatan fakta oleh hakim yang bijaksana. Hakim yang bijaksana juga telah menggunakan prinsip undang-undang yang betul seperti yang ditetapkan oleh Mahkamah Rayuan di dalam kes *Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v Poh Yang Hong* [2015] 5 MLJ 830; yang mana keputusan Mahkamah Rayuan disahkan baru-baru ini oleh Mahkamah Persekutuan dalam kes *Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v Poh Yang Hong* [2016] 6 MLJ 413 (lihat perenggan 59).]
- C**
- D**

E Notes

- For a case on warrant of authority, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 1451.
- For cases on breach of statutory duty, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1258–1264.
- F** For cases on duty of solicitor, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5141–5142.

Cases referred to

- G** *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567, CA (refd)
- Bristol and West Building Society v Fancy & Jackson (a firm); and other actions* [1997] 4 All ER 582, Ch D (refd)
- Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353; [2004] 1 CLJ 357, CA (refd)
- H** *Collen v Wright* (1857) 8 E & B 647 (refd)
- Datuk M Kayveas & Anor v Bar Council* [2013] 5 MLJ 640; [2013] 7 CLJ 533, FC (refd)
- Dickson v Reuters Telegram Co* (1877) 3 CPD 1, CA (refd)
- I** *Excel Securities Plc v Masood and others* [2010] Lloyd's Rep PN 165, QBD (refd)
- Firbank's Executors v Humphreys and others* (1886) 18 QBD 54, CA (refd)
- Fong Maun Yee & Anor v Yoong Weng Ho Robert (practising under the name and style of Yoong & Co)* [1997] 2 SLR 297, CA (refd)

- Frank Houlgate Investment Co Ltd v Biggart Baillie LLP* [2011] CSOH 160; [2012] PNLR 2 (refd) **A**
- Fullji Realty Sdn Bhd v Lim Yong Meng* [2007] 3 MLJ 39, HC (refd)
- Hampden v Walsh* [1876] 1 QBD 189, QBD (refd)
- Knight Frank LLP v Du Haney* [2011] EWCA Civ 404, CA (refd)
- Kuldip Singh & Anor v Lembaga Letrik Negara & Anor* [1983] 1 MLJ 256 (refd) **B**
- Lau Tek Sen @ Lau Beng Chong & Ors v SK Song* [1995] MLJU 302; [1995] 2 CLJ 425, HC (refd)
- Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ Rep 239, SC (refd)
- Leggo v Brown & Dureau Limited* [1923] 32 CLR 95, HC (refd) **C**
- Nelson v Nelson* [1997] 1 WLR 233, CA (refd)
- P & P Property Ltd v Owen White & Caitlin LLP and another* [2016] EWHC 2276, Ch D (refd)
- Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v Poh Yang Hong* [2016] 6 MLJ 413; [2016] 6 AMR 595, FC (refd) **D**
- Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v Poh Yang Hong* [2015] 5 MLJ 830; [2015] 6 CLJ 740, CA (folld)
- Penn v Bristol and West Building Society and others* [1997] 3 All ER 470, CA (distd)
- Rita Zwebner v The Mortgage Corporation Ltd* [1998] PNLR 769, CA (refd) **E**
- SEB Trygg Liv Holding Aktiebolag v Manches and others* [2005] EWCA Civ 1237, CA (refd)
- SPH De Silva Ltd v Balwant Singh* [1960] 1 MLJ 175 (refd)
- Sino-British (M) Ltd v Nanyang Development Co (M) Ltd & Anor* [1969] 1 MLJ 117 (refd) **F**
- Wong Kiong Hung & Anor v Chang Siew Lan (f)* [2009] 4 MLJ 183; [2009] 3 CLJ 751, CA (refd)
- Yonge v Toynbee* [1908–10] All ER Rep 204, CA (refd)

Legislation referred to

Contracts Act 1950 ss 180, 181, 183, 186, 188

Appeal from: Suit No 22NCVC-435–08 of 2014 (High Court, Shah Alam)

- R Thayalan (RN Sivaraja and V Priyadharisini Nair with him) (Balan Govind & Assoc) in Civil Appeal No B-01(NCVC)(W)-146–04 of 2016 for the appellant.* **H**
- Wan Norazimin bt Kassim (Salwati bt Umar and Nurhamimah bt Amrah with her) (Legal Advisor, Selangor State Legal Advisor Office) in Civil Appeal No B-01(NCVC)(W)-171–05 of 2016 for the appellant.*
- Rajashree Suppiah (Goh Chee Hong with her) (Simon Hue & Assoc) in Civil Appeal No B-01(NCVC)(W)-146–04 of 2016 for the first, second, third and fourth respondents.* **I**
- Leong Wai Hong (David Tan with him) (Skrine) in Civil Appeal No B-01(NCVC)(W)-146–04 of 2016 for the fifth respondent.*

- A** *Wan Norazimin bt Kassim (Salwati bt Umar and Nurhamimah bt Amrah with her) (Legal Advisor, Selangor State Legal Advisor Office) in Civil Appeal No B-01(NCVC)(W)-146-04 of 2016 for the sixth respondent.*
- B** *Rajashree Suppiah (Goh Chee Hong with her) (Simon Hue & Assoc) in Civil Appeal No B-01(NCVC)(W)-171-05 of 2016 for the first, second, third and fourth respondents.*

Vernon Ong JCA:

INTRODUCTION

- C**
- D** [1] The first to fourth plaintiffs purchased a piece of land from the purported owner. It later transpired that the purported owner was not the true owner of the land but a fraudster who impersonated the true owner. Consequently, the plaintiffs failed to acquire title to the land. The plaintiffs sued the solicitors ('the first defendant') who were acting for the purported owner for damages for breach of warranty of authority to act and for breach of stakeholders' duties. The plaintiffs also sued: (i) their own solicitors ('the second defendant') for negligence; and (ii) the Registrar of Titles and the Selangor State Government ('the third and fourth defendants') and its officers ('the fifth and sixth defendants') for negligence and breach of statutory duties.
- E**

[2] After a full trial of the action, the learned judge allowed the plaintiffs' claim and apportioned liability against the defendants as follows:

- F**
- | | |
|------------------------|-------|
| First defendant | – 70% |
| Second defendant | – 10% |
| Third–Sixth defendants | – 20% |

- G** [3] Appeal 146 is by the first defendant whilst Appeal 171 is by the third to sixth defendants. In this judgment, the parties shall be referred to as they were in the court below.

THE SALIENT FACTS

- H** [4] The background facts in this case have been comprehensively set out in the judgment of the learned judge. We shall set out a brief summary of the salient facts.
- I** [5] Pursuant to a sale and purchase agreement dated 1 June 2012 ('the SPA') the plaintiffs purchased a piece of agricultural land from a fraudster who claimed to be Soh Chuan Seng, the purported owner for the purchase price of RM2.6m. The first defendant was acting as solicitors for the fraudster whilst the second defendant was acting for the plaintiffs.

- [6] Prior to the execution of the SPA the following events transpired: **A**
- (a) the first defendant had forwarded via e mail to the second defendant a 'Warrant to Act' dated 9 May 2012 signed by the fraudster;
 - (b) a land search at the land registry showed that the fraudster was the registered proprietor; **B**
 - (c) the plaintiffs had deposited the deposit sum of RM700,000 ('the deposit sum') with the second defendant;
 - (d) the second defendant forwarded a cheque for the deposit sum drawn in favour of the fraudster to the first defendant to be held as stakeholders; **C** and
 - (e) on 31 May 2012, the first defendant wrote to the second defendant confirming that the original issue document of title ('IDT') was in his possession and that the fraudster did not have an income tax file reference. He also enclosed the SPA and the memorandum of transfer duly executed by the fraudster, certified true copies of the IDT, quit rent receipt and the fraudster's identity card. **D**
- [7] On 4 June 2012 the plaintiffs lodged a private caveat over the land. The following day, the second defendant forwarded the executed and stamped copies of the SPA to the first defendant. Meanwhile, at the first defendant's requests, the plaintiffs deposited the sum of RM52,000 with the second defendant as part payment of the purchase price. The second defendant would remit the said sum to the Inland Revenue Board to account for real property gains tax on the fraudster's behalf. **E**
- [8] On 30 August 2012, the second defendant forwarded the balance purchase price of RM1,848,000 to the first defendant as stakeholders. The first defendant was not to release the same to the fraudster 'unless and until the Transfer is duly presented at the relevant Land Office'. On 3 September 2012, the second defendant received the original IDT and related documents from the first defendant. **F**
- [9] The second defendant was unable to present the transfer documents for registration as there was a caveat lodged over the land by Top Glove Engineering Sdn Bhd ('Top Glove'). However, after Top Glove's caveat was subsequently removed the transfer was registered at the land registry on 10 September 2012. On 12 September 2012, the first defendant released the balance purchase price to various third parties. **G**
- [10] On 14 September 2012, the second defendant was informed by Messrs Abraham Ooi & Partners ('the solicitors') acting for Soh Chuan Seng ('Soh') the registered proprietor of the land that Soh had entered into a sale and **H**
- I**

A purchase agreement with Top Glove for the sale of the land and that Soh had never entered into any agreement with the plaintiffs.

B [11] Concerned as to the true ownership of the land, the second defendant wrote to the first defendant on 19 September 2012 advising the first defendant not to release the purchase price to the fraudster. In his reply, the first defendant informed that, he had released the balance purchase price to the fraudster on 12 September 2012 since the land had already been registered in the plaintiffs' name on 10 September 2012.

C [12] Meanwhile, the balance purchase price had been disbursed to various third parties: RM1.654m to Fasa Suria Malaysia Sdn Bhd, RM168,000 to Yau Eng See and RM13,700 to Perumal a/l Arumugam; the remaining RM12,300 went towards the first defendant's legal fees. Subsequently, the first defendant returned RM12,300 and Perumal's portion of RM13,700 to the second defendant. Yau Eng See also returned his portion of RM168,000 to the plaintiffs.

E [13] Meanwhile, it transpired that the third defendant had entered a registrar's caveat on the land on 19 September 2012 and Top Glove had lodged a second private caveat on 26 September 2012. However, the registrar's caveat was cancelled on 9 November 2012 and the land was transferred to Top Glove on 29 November 2012.

F FINDINGS OF THE HIGH COURT

- [14] The findings of the learned judge may be summarised as follows:
- G (a) the first defendant has given an implied undertaking to the plaintiffs that he has the authority to act for Soh the true owner of the land;
 - (b) the first defendant had breached the warranty of authority to act for Soh the true owner of the land (*Penn v Bristol and West Building Society and others* [1997] 3 All ER 470 (CA));
 - H (c) the first defendant breached his duties as stakeholder when the first defendant failed to comply with the terms of cl 5(b) of the SPA by releasing the balance purchase price to third
 - I (d) parties prior to the expiry of seven days after the presentation of the memorandum of transfer (*Datuk M Kayveas & Anor v Bar Council* [2013] 5 MLJ 640; [2013] 7 CLJ 533 (FC));
 - (e) the second defendant was negligent in that he failed to discharge his duty as a reasonably skilled conveyancing lawyer;

- (f) the third to sixth defendants were negligent in issuing two original IDT and in not maintaining proper records on registration of transfers of land; A
- (g) the first defendant's counter claim against the plaintiffs for various declarations was dismissed; and
- (h) the first defendant's counter claims against the second and third defendants were also dismissed; B

SUBMISSION OF PARTIES

[15] Learned counsel for the *first defendant* submitted on two main issues: (i) whether there is a breach of warranty to act; and (ii) whether there is a breach of stakeholder's duty. C

[16] On the first issue, learned counsel argued that the general principles in *Penn v Bristol* is not applicable to the present case. He argued that the warrant to act merely stated that the first defendant was appointed to act for the fraudster under the name of Soh only and nothing more. The fraudster had his identity card with his face bearing Soh's name and he also had the original IDT. The identity card number and the face corresponded with the fraudster. The first defendant also took photocopies of the identity card. As the imposter was not who he said he was, he argued that the first defendant's position is exactly the same as the solicitor concerned in *P & P Property Ltd v Owen White & Caitlin LLP and another* [2016] EWHC 2276 (Ch) where the English High Court held that the solicitor did not commit a breach of the warranty of authority to act. Learned counsel also alluded to *Lau Tek Sen @ Lau Beng Chong & Ors v SK Song* [1995] MLJU 302; [1995] 2 CLJ 425 and *Fullji Realty Sdn Bhd v Lim Yong Meng* [2007] 3 MLJ 39 where the courts referred to *Yonge v Toynbee* [1908–10] All ER Rep 204 and *Penn v Bristol* was not considered. D

[17] Learned counsel also argued that in the present case it is not disputed that the fraudster existed. Prior to the execution of the SPA there were negotiations between the fourth plaintiff and one Mr Ang, a friend of the fraudster. The agreement to enter into the SPA had already been made even before the parties came to see the first defendant. Therefore, he argued that it cannot be the representation of the first defendant which induced the plaintiffs to buy the land. The plaintiffs relied on Ang's representation. There was therefore no breach of warranty of authority to act. The learned judge's finding that the first defendant was careless in that the first defendant would have known that his client was not the real Soh if he had conducted the caveat search on the land is not relevant to this issue. E

[18] As to the second issue, learned counsel argued that the plaintiffs have not pleaded any cause of action for breach of stakeholder's duties (*Lee Ah Chor* F

[18] As to the second issue, learned counsel argued that the plaintiffs have not pleaded any cause of action for breach of stakeholder's duties (*Lee Ah Chor* G

[18] As to the second issue, learned counsel argued that the plaintiffs have not pleaded any cause of action for breach of stakeholder's duties (*Lee Ah Chor* H

[18] As to the second issue, learned counsel argued that the plaintiffs have not pleaded any cause of action for breach of stakeholder's duties (*Lee Ah Chor* I

- A *v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ Rep 239 (SC); *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353; [2004] 1 CLJ 357 (CA)). Even if there was a stakeholder's duty there was no breach of it. The second defendant acting for the plaintiffs in the SPA had varied cl 5(b) of the SPA which variation was
- B accepted and acted upon by the first defendant acting for the fraudster. Further, the monies paid to the third parties were paid on account of the fraudster and not by the first defendant on his own accord.
- C [19] In reply, learned counsel for the plaintiffs argued that pursuant to the warrant to act the first defendant represented to the plaintiffs that he had the authority for Soh in the sale and purchase transaction of the land. As such, the first defendant knew that the second defendant and the plaintiffs would be relying on his having the authority of Soh to bring the transaction to fruition.
- D In fact, the plaintiffs through their solicitor the second defendant did rely on the first defendant as having the authority of Soh to complete the sale in that all the conveyancing documents were finalised and executed through the first defendant. Whether the first defendant was acting bona fide or not knowing that his client was a fraudster is no defence (*Lau Tek Sen; Yonge v Toynbee; Fong Maun Yee & Anor v Yoong Weng Ho Robert (practising under the name and style of Yoong & Co)* [1997] 2 SLR 297 (CA); *Wong Kiong Hung & Anor v Chang Siew Lan (f)* [2009] 4 MLJ 183; [2009] 3 CLJ 751 (CA)).
- E
- F [20] Learned counsel for the *plaintiffs* also argued that the fact that the first defendant breached his duties as a stakeholder is pleaded in para 50 of the amended statement of claim. It was also submitted that the learned judge had applied the correct principle of law on the facts in holding that the terms of the stakeholding contained in cl 5(b) of the SPA required the first defendant as the fraudster's solicitors to release the balance purchase price to the vendor upon
- G the expiry of seven days of the presentation of the transfer documents. In breach of the express terms, the first defendant not only released the monies to various third parties including himself but also released the same before the expiry of the stipulated seven days from the presentation of the transfer documents. Had the first defendant complied with the terms of his
- H stakeholding, the balance purchase price would only have been released on 19 September 2012 which was the very date he was asked to hold the release of the same.
- I [21] For the *second defendant*, learned counsel argued that *P & P Property Ltd*, is distinguishable on the facts as there was no warrant to act in that case. In the present case, the warrant to act refers to the land in question. The question of apportionment of blame is a question of fact to be decided at the discretion of the trial court and should not be disturbed by an appellate court (*Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other*

appeals [2003] 1 MLJ 567 (CA)).

A

[22] For the *third defendant*, learned state assistant legal adviser ('ALA') adopted the submission of counsel for the plaintiffs and the second defendant. However, learned ALA also argued that the first defendant was negligent because he failed to verify with the land office the discrepancy between Soh's address in the photocopy of the identity card and in the IDT. At any rate, the third defendant was only acting in an administrative capacity when it registered the transfer of the land into the names of the plaintiffs. When the first defendant conducted the land search, it issued the search report in accordance with its administrative duties. The third defendant took all necessary steps to verify the ownership of the land and acted in good faith. As such the third defendant is not liable. Only one IDT was issued by the third defendant. The IDT with the first defendant is not the original title.

B

C

DECISION

D

[23] The first question to be considered relates to the issue of breach of warranty of authority. Learned counsel for the first defendant cited *P & P Property Ltd* to support his argument that the first defendant's client was a fraudster impersonating the true owner and that the first defendant was acting on the fraudster's instructions. Therefore, the implied warranty to act is limited to the authority to act for the fraudster and not for the true owner of the land.

E

[24] *P & P Property Ltd* was not considered by the learned judge as the judgment of the English High Court was only delivered subsequent to the judgment of the learned judge in the present case.

F

[25] In *P & P Property Ltd*, Ms Lim, a consultant solicitor at Owen White had acted for an individual who introduced himself as Clifford Harper the owner of a residential property. Ms Lim dealt with P & P Property's ('the purchaser') solicitors in the sale transaction. The contract was expressed to be between the seller and buyer; the seller was identified as 'Clifford Michael Phillip Harper of 52 Brakenbury Road, London W6'. Ms Lim signed the contract on behalf of the fraudster. That individual turned out to be a fraudster who had impersonated the true owner. As a result, the plaintiff failed to get title to the property and the fraudster had disappeared with the purchase price. The plaintiff sued Owen White for breach of warranty of authority, negligence, breach of trust and breach of undertaking on the basis that they had authority to act for the owner of the property, and that they were properly instructed by the true Clifford Harper, when they were not.

G

H

I

[26] In his judgment, Robin Dicker QC (sitting as a deputy High Court judge) opined that 'The doctrine of warranty of authority, although firmly

A established ever since the decision in *Collen v Wright* (1857) 8 E & B 647 in
1857, has been described as anomalous and fraught with difficulties; see
B *Reynolds, Breach of warranty of authority in modern times* [2002] LMCLQ 189
at p 191'. The learned deputy High Court judge found that whilst Owen
White had the authority of the fraudster, the issue was whether Ms Lim is to be
taken as having impliedly promised not merely that she had the authority of her
client, which she did, but also that she had the authority of the true Mr Harper
and owner of the property.

C [27] The learned deputy High Court judge found that *P & P Property* failed
to establish the necessary warranty of authority on the basis that Owen White
identified their principal as the registered title owner, on the following grounds.

(a) first, an agent does not, simply by acting as agent, represent that his
principal will perform the contract or is solvent or make any other
D representation as to the principal's attributes or characteristics. The court
should not imply a warranty of authority which has an effect of going
beyond the basic representation, save where it is clear that the necessary
promise is properly to be implied, particularly so in relation to
professionals, including solicitors, who do not normally undertake an
E unqualified obligation;

(b) secondly, as far as Ms Lim and the purchaser's solicitor (Mr Robinson)
were concerned, 'Clifford Michael Phillips Harper' was Ms Lim's client
and the person selling the property who, they both assumed, was also the
true owner. It turned out that this was incorrect. The question is whether,
F in these circumstances, Ms Lim is to be taken as having impliedly
promised not merely that she had the authority of her client, which she
did, but also that she had the authority of the true Mr Harper and owner
of the property. Mr Robinson's evidence was not that he understood that
such a warranty had been given, but rather that he assumed that Owen
G White would have taken appropriate steps to establish their client's
identity and that he had no reason to doubt that as a professional firm
Owen White had not done all the correct due diligence to establish the
identity of their client as the true owner of the property. Mr Robinson
accepted that he knew that he could have taken steps to protect his client
H against the risk which he understood existed but did not do so; and

(c) thirdly, the implications of such a warranty of authority would be
difficult to reconcile if a solicitor who acts for someone purporting to sell
a property thereby warrants that their client is the registered title holder,
I solicitors engaged in conveyancing transactions would effectively be
guaranteeing that their client was the registered title holder, and would be
strictly liable if this was not the case.

What is a warranty of authority?

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[28] In the context of the law of agency, what is warranted by an agent is quite straightforward. The party acting for another, the agent, warrants that he has authority from another person (the principal). The person making the warranty represents that he is an authorised agent for and on behalf of a principal.

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[29] In contract, the general rule is that where an agent has contracted as an agent, the agent cannot be made personally liable to the third party who contracted with him: s 183 of the Contracts Act 1950. If, however, the agent had no authority to contract and the contract was entered not on the strength of the representation of authority made by the agent, the agent will be so personally liable: ss 180, 181, 186 and 188 of the Contracts Act 1950.

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[30] As such, what is warranted is only that the agent has authority from his principal: this is something within the agent's knowledge. Ordinarily, an agent does not warrant beyond that. For instance, he does not warrant (i) that his principal is solvent (*Leggo v Brown & Dureau Limited* [1923] 32 CLR 95); or (ii) that his principal will perform the contract, or in the context of litigation, the agent, normally a solicitor does not promise that a claim is valid.

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[31] Difficulties, however, arise when the cause of the lack of authority is that the principal has never existed, no longer exist, or lack capacity. Where a person, by words or conduct, represents that he has actual authority to act on behalf of another, and a third party is induced by any representation to act in a manner in which he would not have acted if that representation had not been made, the first-mentioned person is deemed to warrant that the representation is true, and is liable for any loss caused to such third party by a breach of that implied warranty, even if he acted in good faith, under a mistaken belief that he had such authority (*Bowstead & Reynolds on Agency*, (19th Ed) at p 581).

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The doctrine of breach of warranty of authority

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[32] To begin with, it is pertinent to note that s 188 of the Contracts Act 1950 is analogous to the common law doctrine of implied warranty of authority by the agent. This doctrine which was established in the case of *Collen v Wright* (1857) 8 E & B 647, Ex Ch. enunciates that an agent who impliedly warrants that he has authority, is liable to be sued on his warranty. The duty is grounded on an implied warranty by the agent that he has authority and the action, being in contract, lies even if the agent honestly believed he had authority. Section 188 reads as follows:

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Liability of pretended agent

- A A person untruly representing himself to be the authorized agent of another, and thereby inducing another person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or any damage which he has incurred by so dealing.
- B [33] In *Collen v Wright*, a land agent had purported to sign a lease of a farm on behalf of a person who had not given him authority to do so. Consequently, the lease was not enforceable against the client and the third party's action for specific performance failed. The land agent was found liable to the third party irrespective of negligence. It was held that a person who professes to act as an agent impliedly contracts with the third party that he has authority to act on behalf of his principal. The third party recovered the costs of his specific performance action as damages for breach of this implied contract. *Collen v Wright* involved creating a contractual liability for a particular type of representation, and hence a strict liability. Accordingly, where a professional agent represents to a third party that he is acting as an agent whilst having neither actual nor apparent authority to do so, he will incur liability to the third party. Branwell LJ described the doctrine in *Dickson v Reuters Telegram Co* (1877) 3 CPD 1 at p 5 in the following manner:
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- E *Collen v Wright* establishes a separate and independent rule, which, without using language rigorously accurate, may be thus stated: if a person requests and, by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself and a transaction with the person whose authority he represents that he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction. That seems to me to be the substance of the decision in *Collen v Wright*.
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- G [34] Stated simply, the doctrine of implied warranty of authority is this: where any person purports to do any act or make any contract as agent on behalf of a principal, he is deemed to warrant that he has, in fact, authority from such principal to do the act to make the contract in question. And if he has no such authority, he is liable to be sued for breach of warranty of authority by any third person who was induced by his conduct in purporting to act as agent, to believe that he had authority to do the act or make the contract, and who, by acting upon such belief, has suffered loss in consequence of the absence of authority (*Halsbury's Laws of England*, 'Agency' (4th Ed) Reissue, Vol 1(2) at para 172).
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- I [35] Insofar as the doctrine relates to solicitors, a review of the following cases indicates that the courts have both extended and limited the scope of the action. In *Yonge v Toynbee* the solicitor entered an appearance in a defamation action not knowing that the defendant, who had hitherto instructed it, had been certified insane. The firm was held liable for the costs of the other side on the basis of an implied warranty or contract that they had the authority. The

reasoning of the court is plainly directed towards the proposition that liability for breach of warranty of authority is strict. The justification is that, if the agent does not have the authority which he claims, the third party may have no claim against the supposed principal. Treating the agent, in such a situation, as having impliedly warranted his authority, gives the third party a claim against the agent, where otherwise he may have no claim at all.

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[36] In *Penn v Bristol*, the English Court of Appeal held a solicitor involved in the sale of land owned by a husband and wife, who had the authority of the husband to sell it but not that of the wife (whose signature had been forged), was liable, not only to the purchaser, but to a mortgage lender who lost out when it transpired that the sale was void. The solicitor for the vendor had had no direct dealings with the mortgage lender though it had every reason for knowing that there was likely to be one.

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[37] *Bristol and West Building Society v Fancy & Jackson (a firm); and other actions* [1997] 4 All ER 582 is another case concerning a proposed re-mortgage by a husband and wife of their house to secure an advance from a building society. The wife did not know of the transaction and her signature on the mortgage deed had been forged. The defendants were solicitors acting for the mortgagor and mortgagee. The defendants were found to be in breach of their retainer and liable for breach of warranty of authority. The English High Court held that the solicitors must be taken to have warranted to the lender that the mortgage deed which he delivered on completion as solicitor for the borrowers was delivered with the authority of both the husband and wife. Chadwick J said at pp 612–613:

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I can see no reason why the position should be different in the circumstances that the same solicitor acts for both lender and borrower. I do not hold that the duty of the solicitor, as solicitor for the lender, is increased by the fact that he acts also for the borrowers; but, equally, I can see no reason why, as solicitor for the borrowers, he should not be taken to warrant to the lender that he is acting for them in the transaction with their authority. This does not, necessarily, mean that he is warranting that the signature on the mortgage deed is authentic; but it has much the same effect.

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[38] In *Nelson v Nelson* [1997] 1 WLR 233, the solicitors had been instructed by the plaintiff to take the necessary steps to protect the plaintiff's interest in a landed property. However, the plaintiff being an undischarged bankrupt had no interest in the property, which had vested in the trustee in bankruptcy. Peter Gibson LJ said at p 237:

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A Prima facie his authority is to bring proceedings in the name of his client and I do not see that he warrants more than that he has a retainer from the client who exists and has authorised the proceedings and against whom a costs order can be made. He does not warrant that the client has a good cause of action or that the client is solvent.

B [39] *Rita Zwebner v The Mortgage Corporation Ltd* [1998] PNLR 769 is another instance of mortgage fraud over a house jointly owned by a husband and wife. The husband applied for a loan to be secured on the property. The lenders instructed the solicitors to act in the matter. Later, the solicitors received what appeared to be instructions to also act for the borrowers. It turned out that the husband had forged his wife's signature on the mortgage deed. The wife sued the lender claiming that the mortgage was not binding on her. The lender brought third party proceedings against the solicitors claiming among others, that certain statements in the report on title that they produced amounted to a warranty that the wife's signature was genuine. The report on title contained an express undertaking by the solicitors that 'all appropriate documents will be properly executed on or before completion'. At first instance, Lloyd J held that the solicitors were liable for breach of their express undertaking that all appropriate documents would be properly executed on or before completion. The solicitors' appeal to the Court of Appeal was dismissed.

E [40] In *SEB Trygg Liv Holding Aktiebolag v Manches and others* [2005] EWCA Civ 1237 Buxton LJ, delivering the judgment of the court said at para 66 that:

F ... it is important to bear in mind that generally a solicitor conducting proceedings does not warrant what he says or does on behalf of his client. Thus he does not warrant that his client, the named party to proceedings, has title to sue, is solvent, has a good cause of action or defence or has any other attribute asserted on his behalf. The solicitor relies upon his client's instructions for all these things, as he will do for naming his client correctly. As he gives no warranty as to the accuracy of his instructions generally, it is difficult to see why the naming of his client should be treated as an exception. Why should this be any different, for example, from the naming of a client who has no title to sue?

H [41] In *Knight Frank LLP v Du Haney* [2011] EWCA Civ 404, Tomlinson LJ referred to the *SEB Trygg* case at paras 14–15. He said that in such circumstances it is axiomatic that a solicitor gives no warranty as to the accuracy of his instructions. He referred to the statement by *Bowstead & Reynolds on Agency* that 'the basic warranty is only that the agent has authority from his principal: this is something peculiarly within the agent's knowledge. If the principal proves unreliable, that is something in respect of which the third party could have made enquiries'.

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[42] In *Excel Securities Plc v Masood and others* [2010] Lloyd's Rep PN 165, concerning a mortgage fraud, the lender a specialist in short-term commercial loans on the security of land, had agreed to make a loan to an individual claiming to be a Mr Goulding which was to be secured on a property in his name. The whole set up was a scam involving identity theft by the borrower and a property which had no connection with the supposed borrower. The lender sued the borrower's solicitors alleging that they had given a warranty as to the identity of their client, the borrower, and that, because the borrower was an imposter, they were in breach of that warranty. The solicitors were held not liable, on the basis that all they warranted was that they had authority to act on behalf of a person identifying himself as Mr Goulding and claiming to be the registered proprietor of the property.

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[43] In a Scottish case, *Frank Houlgate Investment Co Ltd v Biggart Baillie LLP* [2011] CSOH 160; [2012] PNLR 2, solicitors acted for a named businessman who granted a security over the property of which he was not the title holder. The lender had actually met and had discussions with the borrower, and it was held here that the warranty was only of authority from the named person, and no further warranty of his relationship to the subject matter was required to be implied.

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[44] Section 188 of the Contracts Act 1950 was referred to in a number of cases. In *SPH De Silva Ltd v Balwant Singh* [1960] 1 MLJ 175, an agent was held liable because he had contracted on behalf of the association without authority, and was therefore liable to make compensation to the third person. In *Sino-British (M) Ltd v Nanyang Development Co (M) Ltd & Anor* [1969] 1 MLJ 117, the agent had untruly represented himself as the authorised agent and whose act was not ratified by the principal. The agent was held to be personally liable to make good the loss and damage suffered by the third person.

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[45] In *Fullji Realty Sdn Bhd*, s 188 was referred to in a case dealing with a purported sale and purchase of land by an imposter vendor. The plaintiff's claim against the defendant was for loss suffered in consequence of the defendant's breach of warranty of authority in a purported sale and purchase of a land by an imposter who claimed to be the registered proprietor and for whom the defendant had acted as solicitor. Kang Hwee Gee J (later JCA) held that: (i) to constitute a breach of warranty of authority the defendant solicitor must have warranted to the plaintiff that he was authorised to act for the registered proprietor to sell the land and in consequence thereof induced the plaintiff to sign the option agreement and sale and purchase agreement and to part with its money; (ii) the evidence clearly indicates that this was not the case. The plaintiff had already made up his mind to purchase the land from the imposter before the parties had gone to see the defendant solicitor at his office;

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- A and (iii) the narrative clearly supports the fact that the parties (consisting of the plaintiff, the imposter and other persons accompanying the imposter) had gone to see the defendant only for the purpose of appointing the defendant to act for the vendor, having earlier decided between themselves and the solicitor for the purchaser that the defendant should act for the registered proprietor. As
- B such, the learned judge held that ‘it is well nigh impossible to conclude that the defendant had warranted to the plaintiff that he was authorised to act for the registered proprietor to sell the land’.
- C [46] The governing principles may be distilled as follows. As a general rule, an agent is liable for breach of warranty of authority if the third party has relied on his claim to authority. The agent’s liability arises not from any wrong or omission on his part, but from an *implied undertaking* made by him that the authority he professes to have does in point of fact exist. It matters not whether
- D the agent acted bona fide or under a mistaken belief or had no means of knowledge.
- E [47] What then is the test for determining when such a warranty is deemed to be given. In *Leggo v Brown* at p 106, the court described the ingredients as follows:
- The essentials are (1) assertion of authority; (2) inducement by asserting; (3) transaction which but for that assertion the other party would not have entered into.
- F [48] In *Firbank’s Executors v Humphreys and others* (1886) 18 QBD 54, Lord Esher MR put the test in the following manner at p 60:
- G The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is personally liable for the damage that has occurred.
- H [49] Ultimately, the question of whether a warranty of authority has been given and, if it has, the terms and effect of that warranty, is a question of fact to be decided on the circumstances of each case. We appreciate the fact that particular difficulties arise if the person from whom the agent is taking instructions is a fraudster impersonating someone else.
- I [50] Nevertheless, in determining whether a warranty of authority can be implied in the circumstances of this case, the court should first consider who the first defendant represented that he had the authority to act for; and if so, what attributes, if any, the first defendant represented that such person had.

[51] In this connection, we are inclined to agree with the views expressed by the learned deputy High Court judge in *P & P Property Ltd*, that *Penn v Bristol* and *Bristol & West Building Society v Fancy Jackson* represent a straightforward application of the doctrine of warranty of authority. *Rita Zwebner v The Mortgage Corporation Ltd* is distinguishable on the basis that the relevant part of the appeal was primarily concerned with the construction of an express undertaking which the solicitors had given to the lenders, rather than with the doctrine of warranty of authority. He opined that these cases do not establish that any solicitor who acts for someone impersonating the true owner is necessarily liable for breach of warranty of authority; and that the question whether a warranty of authority has been given rests upon a proper analysis of the facts in any given situation, and not on any preconceived notions.

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[52] *Penn v Bristol* is distinguishable on the basis that that decision was a straightforward application of the doctrine of warranty of authority. The solicitors had represented that they had authority from Mrs Penn, as a result of her husband's fraud, they did not. There was no issue as to who 'Mrs Penn' was for these purposes or what attributes she had. It was not a case in which someone was purporting to be Mrs Penn, so as to raise a potential issue as to which of two individuals was the subject matter of the implied warranty of authority. Not did any issue arise as to her attributes, as she was the joint owner of the property. The lenders having failed to obtain any rights against Mrs Penn, had a claim against the solicitors for breach of warranty of authority.

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[53] In our view, the consideration of the scope of any implied warranty of authority made by the first defendant should be premised on the following underlying principles. First, the basic representation is only that the agent has authority to act for another and this is something within the agent's own knowledge. Secondly, an agent does not warrant that his principal will perform the contract or is solvent or make any other representation as to the principal's attributes or characteristics. Third, the court should not imply a warranty of authority which has an effect of going beyond the basic representation, save where the necessary promise is to be implied. This is especially so in relation to professionals, including solicitors, who do not usually undertake an unqualified obligation.

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[54] The question for determination is whether the circumstances are such that the warranty of authority given by the first defendant is more extensive in effect so as to warrant that he was acting for the true owner of the land. In her judgment, the learned judge found the first defendant liable 'because he has given an implied undertaking that he has the authority to act for Soh Chuan Seng as the true owner of the land'. The learned judge rejected the first defendant's argument that he genuinely

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- A believed that he acted for the true owner and that he had no means of knowing that his client was an imposter. The learned judge citing *Yonge v Toynbee* adopted a strict liability approach. The learned judge held that an agent is personally liable irrespective of whether he had acted bona fide or under a mistaken belief or had no means of knowledge. Although *Yonge v Toynbee* is often cited as a leading case on liability for breach of warranty of authority, it is only a case concerning the inherent jurisdiction of the court concerning costs.
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- C [55] The facts of the present case are similar to that in *Fullji Realty Sdn Bhd* and *P & P Property Ltd* in that the first defendant had acted for a fraudster who claimed to be the proprietor. In this connection, it is pertinent to examine the background facts leading up to the first defendant's retainer as solicitor for the fraudster. In early May 2012, one Mr Sivarajah a/l Palanisamy contacted the first defendant with the intention of referring a land sale transaction whereby the first defendant was to act for the vendor. Later, on 9 May 2012 Sivarajah together with the fraudster met the first defendant. The fraudster gave his National Registration Identity Card ('IC') and the original title deed to the land. The first defendant satisfied himself that: (i) the IC was genuine and that the fraudster was Soh Chuan Seng; and (ii) the details in the original title deed corresponded with the details of the IC. It is also in the evidence the first to fourth plaintiffs were introduced to the land by one Mr Ang, a friend of the fourth plaintiff. The fraudster informed the first defendant that the parties have agreed on the purchase price of RM2.6m, the terms of payment and that the second defendant would be acting as the plaintiffs' solicitors in the land sale transaction. Pursuant thereto, the second defendant forwarded the draft SPA to the first defendant for the first defendant's approval and comments. After the draft SPA was finalised, the SPA was executed by the plaintiffs before it was sent over to the first defendant for execution by the vendor. After the SPA was stamped, the transaction took the course as is usual in conveyancing matters.
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- Upon the balance purchase price being tendered to the Vendor, the second defendant presented the transfer documents together with the original title deed at the land registry for registration. The transfer of the land in favour of the plaintiffs was registered on 10 September 2012. A Registrar's caveat was lodged against the land on 19 September 2012 and later cancelled on 9 November 2012. Top Glove was subsequently registered as the proprietor of the land on 29 November 2012 thereby displacing the plaintiffs' interest in the land.

- I [56] On the evidence, it is plain that the first defendant warranted to the plaintiffs that he was acting for the fraudster — an imposter pretending to be Soh. As such, this is not a case in which, absent a warrant of authority, the plaintiffs would have no claim against the fraudster, notwithstanding the likelihood that the claim would be against someone who cannot be traced and from whom recovery is remote. We have carefully scrutinised the record of

appeal and find that there is no evidence to justify a finding that the warranty of authority was given on the basis that the first defendant identified the fraudster as the true owner of the land. In other words, there is no evidence to justify an extension of the scope of the implied warranty of authority made by the first defendant. Accordingly, we are constrained to hold that there was a misdirection in law and in fact in the court below on this issue.

[57] We will now address the second issue relating to the first defendant's breach of stakeholder's duties. The law on this issue is well settled. The word 'stake' is generally used to apply to any money to be disposed of in accordance with the occurrence of a future event; and the party in possession of the money is often described as a stakeholder. How the money is to be disposed of depends on the terms on which it is held (see *Halsbury's Laws of Malaysia* para 420.020). A stakeholder is defined as a person who receives money and holds it *in medio* (in the middle) pending the outcome of a future event (*Kuldip Singh & Anor v Lembaga Letrik Negara & Anor* [1983] 1 MLJ 256). As a rule the duty of a stakeholder is to hold the money as trustee for both parties to await that event and until that event is known, it is his duty to keep it in his own hands (*Hampden v Walsh* [1876] 1 QBD 189). As to what is in essence stakeholding in the particular circumstances of the present case we need only refer to the following erudite passage from the judgment of Federal Court delivered by Jeffrey Tan FCJ in *Datuk M Kayeas* which bears reproduction *in extenso*.

[31] In our system of conveyancing, 'the word 'stake' is in common parlance used to apply to any money to be disposed of in accordance with what may happen in the future: and whoever is in possession of the money is often described as a stakeholder. The manner in which the money is to be disposed of depends on the terms on which it is held' (*Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd* [1988] 1 MLJ 116; [1987] 2 CLJ 26; [1987] CLJ (Rep) 400 per Hashim Yeop A Sani SCJ, as he then was, delivering the judgment of the former Supreme Court). 'Solicitors who hold funds which are paid to them as stakeholders hold those funds as trustees for the client, whose property the funds remains at all times. Such funds are not held in a contractual or quasi-contractual capacity' (*Halsbury's Laws of England* (4th Ed) Reissue Vol 44(1) para 126) '... the obligations arising under a solicitor's undertaking go beyond contractual effect. They are obligations which a solicitor has a professional duty, as well as a contractual duty, to observe' (*Bentley and Anor v Gaisford* [1997] 1 All ER 842 at p 848 per Sir Richard Scott VC). When solicitors hold funds as stakeholders, they hold those funds as trustees and not in a contractual or quasi-contractual capacity (see *Alimand Computer System Ltd v Radcliffes & Co*, *The Times* 6 November 1991). 'If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit 'as stakeholder', he is under a duty to hold it *in medio* pending the outcome of a future event. He does not hold it as an agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the evidence: see *Skinner v The Trustee of The Property of Reed and Others* [1967] 2 All ER 1286 at p 1287, [1967] Ch 1194 at p 1200 per Cross J until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank ...' (*Burt v Claude Cousins & Co Ltd* [1971] 2 QB 426 per Lord Denning

- A MR in his dissenting judgment which statement of the law was accepted by the House of Lords in *Sorrell v Finch* [1977] AC 728, and referred in *Kuldip Singh & Anor v Lembaga Letrik Negara & Another, Dato' Seri Au Ba Chi & Anor v Malayan United Finance Bhd & Anor* and *OCBC Bank (Malaysia) Bhd & Ors v Lee Lee Fah & Ors & another appeal*, amongst others). 'Once a solicitor holds money in trust for his client or any other party for a purpose, it does not matter whether the amount is sufficient to be utilised for that purpose. The money remains to be in trust' (*Selvaratnam Vellupillai v Dr Jayabalan Karrupiah* [2009] 1 MLJ 794; [2009] 1 CLJ 872 per Zaki Azmi CJ), delivering the majority judgment of the court). Therefore, it is beyond argument that a stakeholder is a trustee and that the breach of a stakeholding term is not just a breach of undertaking but also a breach of trust.

- [58] In the first instance, the first defendant's argument that breach of stakeholder's duties was not pleaded is without merit as the particulars of the breach are contained in para 50 of the amended statement of claim. The learned judge had carefully considered the material evidence and in particular to the fact that the first defendant released the balance purchase price in breach of cl 5(b) of the SPA. We are not persuaded that there was any misdirection on the evidence by the learned judge. Consequently, we would affirm the finding of fact of the learned judge that the first defendant was in breach of his stakeholder's duties.

- [59] Having dealt with the first defendant's appeal, we will now deal with the third to sixth defendants' appeal against the finding that they were negligent in issuing two issue documents of title for the same land and in not maintaining proper records on registration of transfers of land. We have carefully scrutinised the appeal records and we are not persuaded that there was any misapprehension of the facts or any misdirection on the evidence. As such, we agree with the findings of fact by the learned judge. The learned judge also applied the correct principles of law as enunciated by the Court of Appeal in *Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v Poh Yang Hong* [2015] 5 MLJ 830; [2015] 6 CLJ 740 (CA); which Court of Appeal decision was recently affirmed by the Federal Court in *Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v Poh Yang Hong* [2016] 6 MLJ 413; [2016] 6 AMR 595 (FC).

- [60] For the foregoing reasons, the finding of the learned judge holding the first defendant liable for breach of warranty of authority is set aside. The finding of the learned judge on the first defendant's liability for breach of stakeholder's duties is affirmed. The finding of the learned judge against the third to sixth defendants on negligence is affirmed. In the light of the aforesaid, we vary the apportionment of liability and contribution as follows:

First defendant	— 30%
Second defendant	— 10%

Third–Sixth – 60%
defendants

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[61] In conclusion, the first defendant's appeal is allowed in part with no order as to costs. The third to sixth defendants' appeal is dismissed with costs.

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First defendant's appeal allowed in part with no order as to costs and third to sixth defendants' appeal dismissed with costs.

Reported by Dzulqarnain Ab Fatar

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